

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

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**FILE:** B-215704 **DATE:** February 4, 1985  
**MATTER OF:** Provost's Small Engine Service, Inc.

## DIGEST:

1. The requirement that a bidder be an authorized dealer of a particular company is a definitive responsibility criterion, and failure to meet it does not justify rejection of bid as nonresponsive.
2. A negative determination of responsibility of a small business, based on the bidder's failure to meet a definitive responsibility criterion, must be referred to the Small Business Administration under the Certificate of Competency procedures.

Provost's Small Engine Service, Inc. protests the award of a contract to Ludwig Saw and Tool Sharpening under invitation for bids No. DAKF48-84-B-0026, issued by the Department of the Army for repair of lawnmowers and ground-related equipment at Fort Hood, Texas. Provost argues that its low bid should not have been rejected as nonresponsive because it did not meet a solicitation requirement that the contractor be an authorized service dealer for both Briggs and Stratton and Tecumseh equipment. Provost already was an authorized Briggs and Stratton dealer and expected to become an authorized Tecumseh dealer within a short time after bid opening.

We sustain the protest.

The solicitation was a 100 percent small business set-aside with an opening date of June 19, 1984. Provost submitted the low bid of \$70,384 and verified it in writing when questioned. The Army, however, found the bid "non-responsive" based on information supplied by Tecumseh indicating that Provost would not be able to meet the certification requirements before the required contract

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date, July 1, 1984. (The firm had applied for certification on June 22, and according to Tecumseh, approval required a minimum of 30 days.) The contracting officer determined that the requirement was critical and that further delays would add to a backlog of work. She therefore awarded the contract to Ludwig, whose second-low bid was \$86,794.38.

We find that the contracting officer erred in treating the requirement in solicitation Section C.1.2.1.2., "Contractor must be an authorized service dealer for Briggs and Stratton and Tecumseh," as a matter of bid responsiveness. Responsiveness concerns whether the bidder has unconditionally offered to provide exactly what is called for in a solicitation; responsibility concerns its ability to do so. Raymond Engineering, Inc., B-211046, July 12, 1983, 83-2 CPD ¶ 83. Since Provost took no exception to the solicitation requirements, its bid was clearly responsive, and the requirement that it failed to meet is in fact a definitive responsibility criterion. See Houghton Elevator Division, Reliance Electric Co., 55 Comp. Gen. 1051 (1976), 76-1 CPD ¶ 294. Definitive responsibility criteria are objective standards included in a solicitation that establish a measure by which a prospective contractor's ability to perform the contract may be judged. These special standards put firms on notice that the class of prospective contractors is limited to those who meet specified qualitative or quantitative criteria deemed necessary for adequate performance. Watch Security Inc., B-209149, Oct. 20, 1982, 82-2 CPD ¶ 353.

Moreover, if a contracting officer finds a small business to be nonresponsible because it does not meet such criteria, under the Small Business Act, 15 U.S.C. § 637(b)(7)(A) (1982), he or she must refer the matter to the Small Business Administration (SBA) under the Certificate of Competency (COC) procedures. If SBA determines that the offeror is responsible, under the Act that decision is conclusive upon the contracting officer.

Since Provost is a small business, the contracting officer should have referred the negative responsibility determination to the SBA. If the SBA had issued a COC, we would not review that determination since, by law, SBA has conclusive authority to certify whether a small

business is responsible. If the SBA had declined to issue the certificate, then the matter would have been at an end, leaving Provost ineligible for award. See Jack Roach Cadillac, Inc., B-210043, June 27, 1983, 83-2 CPD ¶ 25.

Because of the Army's failure to recognize the responsibility question and follow the procedures required by statute, we sustain the protest. However, since the 7-month contract period ends January 31, 1985, as a practical matter, we cannot recommend termination. We note that on August 14, 1984, the Office of the Judge Advocate General recommended to the Commander, U.S. Army Forces Command, Fort McPherson, Ga., that this matter be sent to SBA after a responsibility investigation. That investigation took 3 months to complete and the matter was never referred to the SBA, since on August 16, 1984, Provost was certified as an authorized service dealer for Tecumseh.

It appears, however, that had the nonresponsibility determination been properly presented to SBA in June 1984, the SBA could or would have found Provost responsible. We have recognized SBA's authority to consider whether, under the circumstances of a particular procurement, a small business concern is capable of performing despite the fact that it does not meet special standards or definitive criteria of responsibility. See, e.g., Baxter & Sons Elevator Co., Inc., 60 Comp. Gen. 97 (1980), 80-2 CPD ¶ 414 (small business is capable of performing even though it does not maintain spare parts inventory required by solicitation to ensure timely performance); J. Baranello and Sons, 58 Comp. Gen. 509 (1979), 79-1 CPD ¶ 322 (small business is capable of performing when it has experience equivalent to that specified in solicitation and plans to hire a consultant who has requisite experience).

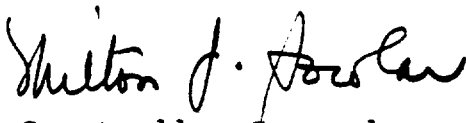
Here, not only had Provost applied for the Tecumseh certification, but also, the record shows, the major portion of the repair work to be done involved Briggs and Stratton equipment, for which Provost was already certified. For example, of 974 mowers to be serviced, 950 had Briggs and Stratton engines, 15 had Kohler and only 9 had Tecumseh engines. Even if Provost had not yet been formally approved by Tecumseh, it seems clear that Provost was technically qualified to repair Tecumseh equipment. In view of the SBA's practice of basing its responsibility determinations on ability to perform, rather than on strict

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compliance with special standards which are included in a solicitation but which are not legally required for performance, id., we believe it highly likely that the COC would have been forthcoming.

Under these circumstances, we believe Provost would have had a substantial chance for award. The firm is therefore entitled to its bid preparation costs, and it should submit a claim, documented as to amount, to the Army. See Everhart Appraisal Service, Inc., B-213369, May 1, 1984, 84-1 CPD ¶ 485.

The protest is sustained.

*for*   
Comptroller General  
of the United States